

COL. JOSEPH A. NICHOLS

AUGUST 31, 1960.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 11322]

The Committee on the Judiciary, to which was referred the bill (H.R. 11322) for the relief of Col. Joseph A. Nichols, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to relieve Col. Joseph A. Nichols, retired, of liability to repay to the United States the sum of \$13,590.65, erroneously paid to him as civilian salary during the period in which he was employed by the officers' open mess, Fort Benning, Ga.

STATEMENT

The Department of the Army has no objection to the relief proposed by the bill.

The Comptroller General advises that he does not view with favor legislation such as the bill and does not recommend favorable consideration.

The claimant, Col. Joseph A. Nichols, retired as an officer in the Regular Army, effective June 30, 1950, after some 30 years of service. Following his retirement he was employed during the period from January 1, 1951, through November 30, 1953, in a civilian position by the main officers' open mess at Fort Benning, Ga., a nonappropriated fund activity of the Army, and received total civilian compensation

during that period of \$13,590.65. In addition he received retired pay in the total amount of \$18,727.20 during that period.

The Comptroller General has ruled that persons employed by non-appropriated fund activities, such as officers' open mess, laundries, golf courses, etc., are regarded as holding a civilian office or position under the U.S. Government within the meaning of the applicable general legislation which limits the permissible combined per annum rate of retired pay and civilian compensation.

Six years after that employment, in December 1959, Colonel Nichols was advised by the Retired Pay Division of the Army Finance Center that his earnings at the officers' open mess were prohibited because his retired pay exceeded the then limitation of \$3,000 (increased in 1954 to \$10,000) and that he must elect to receive either the civilian pay or the retired pay. He elected to retain the retired pay, and is under a legal liability to return to the United States the total amount of his civilian pay, which amounted to \$13,590.65.

In its favorable report on the bill the Committee on the Judiciary of the House of Representatives has commented:

From the evidence adduced the committee is convinced that Colonel Nichols had at all times acted in good faith and was completely unaware that his civilian salary was in derogation of the so-called Dual Compensation Act. Furthermore, to require from him collection of the civilian salary payments he received from a nonappropriated fund activity would create great hardship and extreme burden.

Since on or about December 13, 1959, he has not been employed in any manner and his sole income is his retired pay of \$543 per month. His wife, Mary B. Nichols, has no income of her own and she is entirely dependent upon him for support. His fixed monthly expenditures amount to between \$450 and \$480. His only assets consist of an automobile worth about \$800, a checking account of about \$600, stocks and bonds of about \$800, and a home which is subject to condemnation proceedings for which damages have not been determined.

The committee is of the opinion that the equities in this case merit the relief prayed for by this bill and recommends favorable consideration of this legislation.

The committee agrees with the view of the Committee on the Judiciary of the House of Representatives and believes that the proposed legislation is meritorious. The committee recommends the bill favorably.

Attached and made a part of this report are (1) a letter, dated May 9, 1960, from the Department of the Army, and (2) a letter dated April 22, 1960, from the Comptroller General of the United States.

DEPARTMENT OF THE ARMY,
Washington, D.C., May 9, 1960.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of the Army with respect to H.R. 11322, 86th Congress, a bill for the relief of Col. Joseph A. Nichols.

This bill provides as follows:

"That section 212 of the Act of June 30, 1932 (5 U.S.C. 59a), is waived for the period beginning January 1, 1951, and ending November 30, 1953, both dates inclusive, insofar as it applied to Colonel Joseph A. Nichols, retired (Army serial number O9699), and he is relieved of liability to repay to the United States the sum of \$13,590.65, which was erroneously paid to him as civilian salary during such period while he was employed by the officers' open mess, Fort Benning, Georgia. In the audit and settlement of the accounts of any certifying or disbursing officer of the United States, full credit shall be given for all amounts for which liability is relieved by this Act."

The Department of the Army interposes no objection to the above-mentioned bill.

Records of the Department of the Army show that Joseph Andral Nichols was born on March 16, 1894, in York, S.C. Graduating with first honors from The Citadel at Charleston, S.C., in June 1917, he was commissioned a second lieutenant of Cavalry, Regular Army, on October 25, 1917. On February 20, 1918, the officer was transferred to Infantry and served continuously in that branch until his retirement in the grade of colonel, Regular Army, effective June 30, 1950, with over 32 years' honorable service. Following retirement, the officer was employed by the main officers' open mess at Fort Benning, Ga., for the period January 1, 1951, through November 30, 1953. Subsequently, by a letter dated December 3, 1959, from the Retired Pay Division of the Army Finance Center, Colonel Nichols was advised as follows:

"1. Reference is made to your retired pay account.

"2. The act of July 31, 1894, provides that Regular Army officers and warrant officers, retired for reasons other than disability, hold one Government office by reason of their retired status. Accordingly, they are prohibited from holding another office under the Government where either the retired pay or the civilian salary amount to \$2,500 per annum or more except where the employment is—

"(a) on a temporary, part-time, or intermittent basis;

"(b) appointed to the position by the President of the United States by and with the advice and consent of the Senate; or

"(c) if elected to Congress.

"3. In Comptroller General Decision B-129348, dated October 11, 1956, it was ruled that persons employed by nonappropriated fund activities, such as officers' open mess, laundries, golf courses, etc., do not hold an 'office' within the meaning of the act of July 31, 1894, pertaining to Regular officers. They are regarded, however, as holding a civilian office or position under the U.S. Government within the meaning of section 212, act of 1932, as amended, which limits the combined per annum rate of retired pay and civilian compensation.

"4. Section 212 of the 1932 act provides that when the retired pay amounts to or exceeds the limitation of \$3,000 per annum, an election to receive either the civilian position or the retired pay must be made.

"5. You were employed by the main officers' open mess during the period January 1, 1951, through November 30, 1953, and received full entitlement to retired pay in addition to civilian salary. There is no evidence to indicate that you elected retired pay or the civilian pay. The following amounts represent the overpayment in either case:

	Civilian salary	Retired pay
1951.....	\$4,500.00	\$6,254.28
1952.....	4,824.00	6,451.88
1953 (11 months).....	4,266.65	5,991.04
Total.....	13,590.65	18,727.20

"6. It is requested you inform this headquarters of your election to retain either the civilian salary or retired pay for the period January 1, 1951, through November 30, 1953. Your reply should be received within 10 days' receipt of this letter."

Exercising his option as noted in the above letter, Colonel Nichols elected to retain the retired pay received during the period in question. Accordingly, in view of the Comptroller General's decision that employment by a nonappropriated fund activity is subject to the limitation of section 212 of the act of 1932 (5 U.S.C. 59a), the entire amount of such civilian salary (\$13,590.65) must be regarded as an overpayment for which the recipient is liable to repay to the United States. It appears that the beneficiary of this measure has at all times acted in good faith, and was completely unaware that his civilian salary from the officers' open mess was in derogation of the so-called Dual Compensation Act, *supra*. He has not been employed in any manner since that time, and his sole source of income is his retired pay, currently \$543 per month. Colonel Nichols has also indicated that his wife, Mary B. Nichols, has no income of her own and is wholly dependent upon him for her support and well-being. Their fixed monthly expenditures amount to between \$450 and \$480, and all of his savings have been invested in their home, which has recently been the subject of condemnation proceedings to make way for the construction of a new highway. The amount they will be awarded as damages therefor has not yet been determined. Other than the home and its furnishings, Colonel Nichols' only assets consist of an automobile valued at approximately \$800, a checking account of some \$600, and about \$1,000 in stocks and bonds. Accordingly, in view of his advanced years and the sizable amount of the indebtedness, the repayment of such sum would impose an undue hardship upon this retired officer and his wife. For these reasons, the Department of the Army offers no objection to the relief proposed by H.R. 11322.

The enactment of this bill will involve no Federal expenditures but would relieve the beneficiary of all liability to repay the sum of \$13,590.65 to the United States.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, April 22, 1960.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Your letter of March 29, 1960, acknowledged March 30, requests our comments on H.R. 11322 for the relief of Col. Joseph A. Nichols, retired.

The bill would waive the application of section 212 of the act of June 30, 1932 (5 U.S.C. 59a), for the period beginning January 1, 1951, and ending November 30, 1953, insofar as it applies to Col. Joseph A. Nichols, retired (Army serial No. O9699), and relieve him of liability to repay to the United States the sum of \$13,590.65, which was erroneously paid to him as civilian salary during such period while he was employed by the officers' open mess, Fort Benning, Ga.

Collection proceedings in this case have been handled by the Army and such information as we have concerning the matter was obtained by our audit personnel from the Army records.

Colonel Nichols retired as an officer in the Regular Army, effective June 30, 1950, for length of service. During the period from January 1, 1951, through November 30, 1953, he was employed in a civilian position by the main officers' open mess, Fort Benning, Ga., a nonappropriated fund activity of the Army, and received total civilian compensation during such period of \$13,590.65. In addition, he was paid retired pay totaling \$18,727.20 during that period.

It uniformly has been held that nonappropriated fund activities of the military services are instrumentalities of the United States and that their employees hold civilian positions under the U.S. Government within the contemplation of section 212 of the act of June 30, 1932 (*Sullivan v. United States*, 92 C. Cls. 154, 24 Comp. Gen. 771, 26 Comp. Gen. 122, 33 Comp. Gen. 302; *Standard Oil Co. v. Johnson*, 316 U.S. 481; *Nimro v. Davis*, 204 F. 2d 734). The combined rate of Colonel Nichols' civilian salary and retired pay exceeded the maximum per annum limitation prescribed by section 212—\$3,000 during the period here involved—and, hence, his pay rights were subject to the restrictions of that section. Since his retired pay exceeded the \$3,000 annual limitation, he was entitled to elect to receive either his retired pay or his civilian compensation.

Upon being advised of the application of section 212 to his civilian employment and his right of election, Colonel Nichols elected to retain his retired pay, and the matter was referred to the commanding officer at Fort Benning, Ga., for collection of the civilian salary overpayments. We understand that collection proceedings in the case have been deferred pending the outcome of this legislative proposal for Colonel Nichols' relief.

We do not view with favor legislation which grants preferential treatment to an individual over other individuals similarly situated

and Colonel Nichols is but one of many individuals who have become indebted to the Government through the operation of the dual compensation statute while they were employed by nonappropriated fund activities. Since we are not aware of any special equities in this case which would justify a departure from our consistent position on preferential treatment bills, we do not recommend favorable consideration of H.R. 11322.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

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